A

PP v. TOH TUNG KIT

HIGH COURT SABAH & SARAWAK, SIBU
CHRISTOPHER CHIN SOO YIN J
[CRIMINAL REVISION NO: SBW-43-2-8-2022]
9 NOVEMBER 2022

B

Abstract – *The Wild Life Protection Ordinance 1998 ('Ordinance') of Sarawak was enacted for the specific purpose of protecting biodiversity in the State of Sarawak. Sadly, when cases under the Ordinance come to court, the animals are already dead. The animals are voiceless and cannot voice out their defence. It is up to the courts to highlight their plight, as mandated by the Legislature, to bring the public's attention to the folly of trading in protected animal parts.*

C

D

CRIMINAL PROCEDURE: *Revision – Application for – Revision of decision of Sessions Court – Accused charged at Sessions Court for four charges under Wild Life Protection Ordinance 1998 of Sarawak – Possession of parts of wild life and plants – Accused pleaded guilty and imposed with probation of good behaviour – Whether revision appropriate procedure – Whether there was manifest error – Whether order of probation for good behaviour adequate*

E

ENVIRONMENTAL LAW: *Wildlife protection and conservation – Accused charged at Sessions Court for four charges under Wild Life Protection Ordinance 1998 of Sarawak – Possession of parts of wild life and plants – Accused pleaded guilty and imposed with probation of good behaviour – Whether order of probation for good behaviour adequate given scale of parts of wild life and plants found in accused's possession*

F

The respondent was charged at the Sessions Court, for four charges under the Wild Life Protection Ordinance 1998 ('Ordinance') of Sarawak, for the possession of parts of wildlife and plants protected under the Ordinance. The

G

respondent pleaded guilty and was imposed with a probation of good behaviour for three years in the sum of RM20,000, pursuant to s. 294 of the Criminal Procedure Code ('CPC'). In the present application, the applicant ('prosecution') sought a revision of the proceedings at the Sessions Court. Objecting to the application, the respondent argued that an appeal ought to

H

be the appropriate procedure as a revision was reserved to where there was a manifest error on the face of the record which, he alleged, did not exist in this case.

Held (allowing application for revision; setting aside decision of Sessions Court; and revising decision of Sessions Court by imposing both fine and

I

custodial sentences in respect of all charges preferred against respondent):

(1) A 'probation of good conduct' under s. 294 of the CPC is not a 'sentence' *per se*. This is because such probation is an alternative to sentencing. In this case, an application for revision may be more

appropriate than an appeal against sentence when, in fact, there was no sentence. It was not flawed for the prosecution to apply for a revision instead of an appeal. (paras 14 & 15)

(2) The order of probation for good behaviour, allowed by the Sessions Court, was wholly inadequate given the facts of this case, mainly on the consideration of public interest and for the following reasons, *inter alia*, (i) the scale and severity of the crime. The list of wildlife parts found with the respondent meant that 183 sun bears were hunted and killed together with 148 hornbills – the very pride and symbol of the State of Sarawak – and at least 143 Sambar Deers similarly lost their lives to feed the respondent's business in wildlife body parts. Other animal parts found in his possession included pangolin, porcupine and pheasant. As if that was not enough, also found were stocks of tongkat ali and 21.8kg of gaharu; (ii) the Ordinance was enacted for the specific purpose of protecting biodiversity in the State of Sarawak. Sadly, when cases under the Ordinance come to the courts, the animals are already dead. The animals are voiceless and cannot speak in their defence. It is up to the courts to highlight their plight, as mandated by the Legislature, to bring the public's attention to the folly of trading in protected animal parts; and (iii) the widespread culling of animals, as in this case, adversely affected directly everyone in the society including generations to come. (paras 16, 18, 19, 21 & 29)

(3) While the Sessions Court Judge weighed the mitigating circumstances of the respondent, the criteria of public interest and the need to deter future such crimes were not adequately considered. The bond for good behaviour, pursuant to s. 294 of the CPC, is intended for trivial offences and not for one of the scales for which the respondent was charged with. The respondent's sentence was accordingly varied as per the following (i) in respect of Kapit Case Reference: KPT-63 EG-5/7-2020, (a) for the first charge, two years' imprisonment and a fine of RM50,000, in default a further six months' imprisonment; (b) for the second charge, two years' imprisonment and a fine of RM50,000, in default a further six months' imprisonment; and (c) for the third charge, one year imprisonment and a fine of RM10,000, in default a further three months' imprisonment; and (ii) in respect of Kapit Case Reference: KPT-63 EG-6/8-2020, for the first charge, two years' imprisonment and a fine of RM50,000, in default a further of six months' imprisonment. The custodial sentences in Kapit Case Reference: KPT-63 EG-5/7-2020 were ordered to run concurrently. The custodial sentence in Kapit Case Reference: KPT-63 EG-6/8-2020 were ordered to run consecutively with the sentences in Kapit Case Reference: KPT-63 EG-5/7-2020. (paras 26, 32 & 33)

Obiter:

(1) Human beings cannot exist in a void. We exist in this world only because of the natural environment which supports our existence. This existence is in a delicate balance. When the biodiversity is upset by the culling of wild animals, the balance is upset and, with it, comes the threat to our own survival. The death of a protected animal for profit is a death of part of our eco system and a breach to our delicate biodiversity which supports us. Put bluntly, stealing from the forests is stealing from humankind. This is the very danger which the Ordinance seeks to contain. (para 25)

Case(s) referred to:
Guyang & Ors v. Jabatan Hutan Sarawak [2019] 1 CLJ 401 HC ***(refd)***
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
Rajiman v. Sarawak Forestry Corporation (MYY-42EG-1/1-2022) (Unreported) ***(refd)***
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 294, 323(1)
Federal Constitution, art. 5(1)

For the applicant - Ronald Felix Hardin; DPP (Sarawak State Attorney-General's Chambers)
For the respondent - Augustine Liom & Christine Philimon; M/s Tang & Company Advocates, Sibu

Reported by Najib Tamby

JUDGMENT

Christopher Chin Soo Yin J:

Preliminary

[1] The accused was subject to four charges all under the Wild Life Protection Ordinance 1998 of Sarawak. The case was called up at the Kapit Sessions Court in the District of Sibu, Sarawak, on the 19 July 2022. At the commencement of the trial the accused changed his plea of not guilty to one of guilt.

[2] Following the usual procedure after a guilty plea, the accused, then aged about 59 and who was wheeled into court in a wheelchair, was imposed a probation of good behaviour for three years in the sum of RM20,000 (undeposited) under s. 294 of the CPC for three years.

[3] The prosecution took the unusual step of then applying to the High Court seeking a revision of the proceedings in the court below.

[4] I allowed the application for revision and upon subsequent enquiry and hearing, revised the decision of the learned Sessions Court Judge by imposing both fines and custodial sentences in respect of all the charges preferred against the accused.

[5] The accused has appealed.

The Charges

[6] The accused was charged as follows. One cannot be blamed for being somewhat shocked by the sheer litany of wild life parts found and later admitted to be in the possession of the accused:

1st Charge

That you on the 5th day of October, 2019 at about 1030 hours at Ding Chou coffeeshop, Kapit in the District of Kapit, in the State of Sarawak, did have in your possession one hundred and ninety-two (192) pieces of Argus pheasant's feathers (Argusianus argus), one hundred and fifty-two (152) pieces of Helmeted hornbill's feathers (Buceros vigil), and one hundred and forty-eight (148) pieces of Helmeted hornbill's casques (Buceros vigil), all of which are recognisable parts of Totally Protected Animals under the Wild Life Protection Ordinance 1998, without license, and therefore you have committed an offence under section 37(2)(a) of the Wild Life Protection Ordinance, 1998, read together with section 37(1) of the same, and punishable under Section 29(1)(c) of the Wild Life Protection Ordinance, 1998 read together with Section 37(2)(a) of the same.

Penalty: Imprisonment for two years and a fine of twenty - five thousand ringgit per individual animal part.

2nd Charge

That you on the 5th day of October, 2019 at about 1030 hours at Ding Chou coffeeshop, Kapit in the District of Kapit, in the State of Sarawak, did have in your possession one hundred and eighty-three (183) Sun bear's biles (Helarctos malayanus), ninety-six (96) Porcupine's quills (Hystricidae), eighteen (18) Sun bear's claws (Helarctos malayanus) and sixteen (16) Pangolin's scales (Manis javanica), all of which are Protected Animals under the Wild Life Protection Ordinance, 1998 without license, and therefore you have committed an offence under section 37(2)(b) of the Wild Life Protection Ordinance, 1998, read together with section 37(1) of the same, and punishable under Section 29(2) of the Wild Life Protection Ordinance, 1998 read together with Section 37(2)(b) of the same.

Penalty: Imprisonment for one year and a fine of ten thousand ringgit per individual animal part.

3rd Charge

That you on the 5th day of October, 2019 at about 1030 hours at Ding Chou coffeeshop, Kapit in the District of Kapit, in the State of Sarawak, did have in your possession eighty (80) Tongkat ali (Eurycoma longifolia),

A and twenty one point eight kilogram (21.8 kg) Gaharu (Aquilaria sp), all of which are Protected Plants under the Wild Life Protection Ordinance, 1998 without license, and therefore you have committed an offence under section 30(2) of the Wild Life Protection Ordinance, 1998, and punishable under the same.

B Penalty: Imprisonment for one year and a fine of ten thousand ringgit per individual plant part.

The Issue Of Revision Instead Of Appeal

[7] The respondent took objection to the revision proceedings argued that an appeal should be the appropriate procedure. He argued that revision was C reserved top where there was a manifest error on the face of the record which he alleged did not exist in this case.

[8] The respondent cited the case of *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163; [1987] 2 MLJ 69 which decided that it is D only in exceptional circumstances that a judge may use his power of revision to increase a sentence. The judge is not to assume the role of Public Prosecutor. The law is clear in that the Public Prosecutor is vested with a right of appeal against sentence which he feels is manifestly inadequate.

[9] Section 323(1) of the Criminal Procedure Code states:

E A Judge may call for and examine the record of any proceeding before any subordinate court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and to the regularity of any proceedings of that subordinate court.

F **[10]** The prosecution also relied on the authority of *Liaw Kwai Wah & Anor v. PP* (above) to suggest that the sentence may be substituted upon revision.

[11] The prosecution further cited the two High Court cases of Sibu – *Guyang & Ors v. Jabatan Hutan Sarawak* [2019] 1 CLJ 401; [2019] 10 MLJ 684 (under the Forestry Ordinance 2015) and Miri – *Rajiman v. Sarawak* G *Forestry Corporation* (MYY-42EG-1/1-2022) (under the Wild Life protection Ordinance 1998) where in both cases there was an appeal and revision filed and where the High Court dismissed the appeal but revised the sentences.

[12] It is well established that in the case of an appeal under Part VII of H the Criminal Procedure Code, the appellate court's enquiry is specific to the reasoning in arriving at the sentence. Hence, the appellate court needs to be convinced that the sentence was plainly wrong by virtue of an error of fact, law or that the lower court judge misdirected himself in a material manner so as to render the sentence unsafe or manifestly inadequate or excessive.

I **[13]** A revision goes deeper in that in addition to the same enquiry when an appeal against the sentence is made, the appellate court's net is cast wider and into deeper waters to ensure procedural regularity of the entire proceedings. For example, if a decision of the lower court lacks, for instance,

grounds of judgment resulting in the unavailability of the record of appeal, the High Court may nevertheless, in revision, dig into the entire record of proceedings and evidence admitted and then to put himself into enquiry if the procedure or decision-making process of the lower court was tainted in some significant manner so as to render the decision delivered unsafe, unfair or illegal. The task of the appellate court in such a case of revision is, without a doubt, more arduous.

[14] A "probation of good conduct" under s. 294 is not a "sentence" *per se*. This is because such probation is an alternative to sentencing:

> Section 294 Criminal Procedure Code (extract with emphasis):
>
> > … it is expedient that the that the offender be released on probation of good conduct, the Court may, **instead of sentencing him**, at once to any punishment, direct that he be released on his entering a bond with or without securities during such period as the Court may direct … in the meantime, to keep the peace and be of good behaviour.
>
> One can then argue that a "probation of good conduct" is strictly speaking not a sentence. Hence in this particular case, an application for revision may be more appropriate than an appeal against sentence when in fact there was no sentence. (emphasis added)

[15] I therefore ruled that it was not flawed for the prosecution in this case to apply for revision instead of an appeal.

Reasons For Varying The Order Of The Sessions Court

[16] Having conducted an enquiry of the entire proceedings in the court below, this court finds that the order of probation for good behaviour allowed by the learned Sessions Court Judge in this case was wholly inadequate given the facts of this case mainly on the consideration of public interest and for the reasons narrated below.

[17] Significant references in this judgment that follow are extracted from the paper presented by Mr Sukumaran Vanugopal, *Advocate at the 2nd Borneo Colloquium on the Environmental Justice*, 28 October 2022, Kota Kinabalu, with gratitude:

The Scale And Severity Of The Crime

[18] The list of wildlife parts found with the respondent meant that 183 Sun Bears were hunted and killed together with 148 Hornbills, the very pride and symbol of this State and at least 143 Sambar Deer similarly lost their lives to feed the respondent's business in wildlife body parts. Other animal parts found in his possession included pangolin, porcupine, pheasant.

[19] And as if that was not enough, also found were stocks of tongkat ali and 21.8 kg of gaharu.

[20] If the facts of a particular case are relevant in sentencing, then the scale of the parts found in the possession of the respondent must be considered. For example, the number of sun bears (183) killed to meet the needs of the respondent may be sufficient to decimate that species of protected wildlife from a substantial swath of forest, and for a very long time.

The Role Of The Judiciary In Environmental Law

[21] The Wildlife Protection Ordinance 1998 was enacted by the State legislature for a specific purpose of protecting the biodiversity in the State. It is the duty of the courts to enforce this law. Sadly, when cases under this Ordinance come to the courts the animals are already dead. The animals are voiceless and cannot speak in their defence. It is up to this court to highlight their plight as mandated by the legislature to bring the public's attention to the folly of trading in protected animal parts.

[22] As the judiciary is the guardian of the rule of law this court is in the best position to give environmental law its full the force and effect. Its decisions can ensure environmental responsibility and accountability. The decisions today will determine what is left of the environment for the generations to come.

[23] The former Chief Justice of Malaysia, His Lordship Tun Arifin Zakaria in his address at the opening of the Legal Year 2017 referred to environmental rule of law as consisting of the following aspects:

(i) a system of laws that regulate, as far as possible all human induced actions that have an impact on the environment;

(ii) consistent application of these laws over time and throughout the jurisdiction; and

(iii) effective and fair enforcement against those who breach the law, regardless of the offender's socio-economic or political status.

Expanding on these aspects His Lordship said that the core duty of the Judiciary is to safeguard and

> uphold our constitutional guarantees which must include the right to a clean environment both for the present generation and the future unborn generations ...

Multi-Generational Public Interest Is Directly And Adversely Affected By An Erosion Of Our Environment

[24] In Malaysia, "life" in art. 5(1) of the Federal Constitution has been interpreted broadly to include the right to the environment *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771.

[25] Human beings cannot exist in a void. We exist in this world only because of the natural environment which supports our existence. This environment is in a delicate balance. When the biodiversity is upset by the

culling of wild animals, the balance is upset and with it comes the threat to our own survival. The death of a protected animal for profit is a death of part of our eco-system and a breach to our delicate biodiversity which supports us. Put bluntly, stealing from the forests is stealing from humankind.

[26] This is the very danger the 1998 Ordinance seeks to contain. While I understand the learned Sessions Court Judge weighed the mitigating circumstances of the respondent, the criteria of public interest and the need to deter future such crimes were not adequately considered. The bond for good behaviour under s. 294 of the CPC is intended for trivial offenses and not for one of the scales for which the respondent was charged.

[27] It needs be said that in issues affecting the environment, every member of society has a clear role to play as any individual action by one has an inexorable and ultimate effect on all. The degradation of the environment adversely affects all and not an isolated segment of society, both for the present and for time to come. It is a given that the term "environment" must include by definition, our entire natural environment encompassing the air, earth, sea, forests all of which we need to stay alive and flourish, and which is kept in balance by the flora and fauna that nurture and sustain them. There is "privity" in the legal sense amongst all mankind in this respect for the simple reason being that we stay on and share a single earth.

[28] In further support of the above contention, the judicial handbook on Environmental Law 2004 produced by the United Nations Environment Programme following a series of judges symposia on environmental law, after noting that human existence is dependent on land, water and air and the different forms in which they exist and their interdependence defined "environment" as a complex of natural and anthropogenic factors and elements that are mutually interrelated and affect the ecological equilibrium and the quality of life, human health, the cultural and historical heritage and the landscape.

[29] Hence, the widespread culling of animals as in this case adversely affects directly everyone in our society including to generations to come, and which, as has been stated earlier, the judiciary is entrusted to help protect through the application and enforcement of the laws passed by the legislature.

The Law Is Not Defective

[30] On the point argued by the respondent that the charges were illegal in that the wording of the section states "any species of wild animal" implying that the respondent need to be caught with the whole animal I am guided by the definition of "animal" in the 1998 Ordinance to include "any recognisable part or derivative thereof".

A

Conclusion

[31] For the above reasons, the issue of "public interest" looms large in cases of this nature and has to be given significant prominence in sentencing. I accordingly find the sentence by way of a probation for good behaviour imposed on the respondent on the 19 July 2022 to be manifestly inadequate and I accordingly vary his sentence to the following:

B

[32] In respect of *Kapit* case reference: KPT-63 EG-5/7-2020

1st charge - two years imprisonment and a fine of RM50,000 in default a further six months in prison.

C

2nd charge - two years imprisonment and a fine of RM50,000 in default a further six months in prison.

3rd charge - one year imprisonment and a fine of RM10,000 in default a further three months in prison.

D

All the above custodial sentences to run concurrently.

[33] In respect of *Kapit* case reference: KPT-63 EG-6/8-2020

1st charge - two years imprisonment and a fine of RM50,000 in default a further six months in prison.

E

Custodial sentence to run consecutively with the sentences in case reference KPT-63 EG 5/7-2020 (above).

[34] The decision of the learned Sessions Court Judge made on the 19 July 2022 at *Kapit* is set aside and substituted with today's order.

F

G

H

I